BRIEF OF PETITIONER.

NATURE OF CONTROVERSY.

The main question involved here is,

> WHEN DOES THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS CEASE AND DOES IT HAVE THE RIGHT TO OPEN UP AND REVERSE ITS OWN JUDGMENTS AT LATER TERMS AND WHEN IT HAS NO CONTROL OF THE MANDATE?

The other question that grows out of this is,

> IF SUCH PROCEDURE RESULTS IN EFFECTIVELY CONFISCATING PETITIONER'S PROPERTY OR DEPRIVING HIM OF THE RIGHT TO SUE TO RECOVER HIS PROPERTY, CAN IT BE UPHELD?

Foreword.

In view of Rule 38, Section 5, of this Court, petitioner appreciates that this court is not interested in a case of this nature because there is a large amount involved, but is interested if it involves an important principle of law or is in conflict with the law as interpreted by this court. Petitioner feels the case here presented is absolutely without precedent, contrary to the law and every applicable decision of the Supreme Court, both as to the assumption of jurisdiction when it had none, and if this court can inquire into the Circuit Court's second judgment, if that Court did not in fact have jurisdiction of the parties at the trial when the non resident proved

that there was a novation and "he, the non resident, only took the notes from the City on its direct promise to him to pay them and in consideration of that promise, he released the corporation of an indebtedness it owed him."

The Circuit Court's decision as to whether a note made by a corporation and payable to a corporation or order and endorsed in blank prevented the holder in due course from suing thereon was novel as to construction of the assignee statute as the note following 113 A. L. R. 560 sets out. It was also novel because the court had already found the plaintiff was entitled to sue and recover in the Federal Court and had written its opinion and sent down its mandate, which it had not recalled and in fact reversed its own opinion at a later term when it had no jurisdiction.

But in addition to that, if it had any authority to inquire into its earlier judgment, it entirely overlooked the novation which the Federal Courts have always recognized under the assignee statute as authorizing the new non resident holder to sue them in the Federal Court.

Citizens Saving v. *Sexton,* 264 U. S. 310.
J. I. Case Co. v. *Pulaski County,* 210 Fed. 366.

The Circuit Court sought to sustain its authority to reverse its own judgment at a later term by citing as Authority:

Utah-Nevada Co. v. *DeLamar,* 113 Fed. 113, but that case in no way is any authority. That case was started in the State Court and removed *over the objections* of the plaintiff into the Federal Court, the suit was on a contract and not on a negotiable instrument and no final judgment was ever entered in the Federal Court, but the *case was remanded* to the State Court for trial.

The defendant never raised the jurisdictional question in this suit until the case was back in the District Court after appeal. The District Judge wouldn't reverse

the appellate court for assuming jurisdiction; the fact it wrote the opinion and sent down its mandate showed by implication it had passed on that question.

The court then went on to find the notes were past due when assigned. Even if they were, that was no reason for denying jurisdiction but the evidence was, the time of payment had been extended by agreement and the notes were not past due when assigned (p. 91 of record in 7695) and which was proved by the defendant. The Court then as grounds for holding it had no jurisdiction cited a number of cases in 91 F. 2d 563. While it entirely disregarded the novation feature the cases cited as blank endorsement of negotiable paper made by a corporation in no way sustained the holding and called for the note in A. L. R. In fact the note in A. L. R. points out that the cases cited by the court to sustain this ruling do not do so, but in fact only sustain the plaintiff.

The conclusion of that opinion, finding the District Court had no jurisdiction, was only a reversal of its former unreversed opinion that the District Court had jurisdiction and in effect ordered it to enter a judgment for Green which the Court did, and then reversed it for obeying its mandate.

Reference to the Reported Opinions in the Suit to Have the Lower Court Show Cause.

The Circuit Court gave no reason or authority to refuse the petition to ask the Judge to show cause why he failed and refused to enter judgment on its mandate.

Basis of Jurisdiction to Entertain Petition.

Mandamus lies to compel a court to exercise jurisdiction where it has dismissed the cause or refused to proceed on ground of supposed want of jurisdiction.

Grossmeyer, 177 U. S. 665, 4 A. L. R. 583.

Judge can be mandamused to enter final judgment in obedience to mandate of higher court.

Re National Park Bank, 256 U. S. 131.
U. S. v. *Moyer*, 235 U. S. 129.

We have repeatedly held *that no court* can set aside or alter its final judgments after the expiration of the term in which they are entered.

Title 28, Section 347, United States Code.

Where the sole ground of jurisdiction alleged is diversity of citizenship, the judgment of the Circuit Court of Appeals is final.

SPECIFICATION OF ASSIGNED ERRORS.

First Error.

THE CIRCUIT COURT WAS BOUND BY TITLE 28, SECTION 347, MAKING ITS FIRST JUDGMENT FINAL.

Second Error.

THE CIRCUIT COURT HAD NO JURISDICTION TO REVERSE ITS OWN JUDGMENT AT A LATER TERM.

Third Error.

THE CIRCUIT COURT ERRED IN REFUSING TO ORDER THE LOWER COURT TO SHOW CAUSE WHY IT FAILED AND REFUSED TO ENTER A JUDGMENT ON ITS UNRECALLED MANDATE.

ARGUMENT.

The three questions interlock and it is felt as each questions bears on the other a general statement covering all three may avoid confusion.

The main point at issue is,

WHEN DOES THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS TO REVIEW CEASE AND DOES IT HAVE ORIGINAL JURISDICTION TO REVIEW BY COLLATERAL ATTACK ITS OWN FINAL JUDGMENTS?

The motion to enter up a judgment in the lower court on the original mandate was made for two reasons.

As the plaintiff saw it, after the Circuit Court assumed jurisdiction, wrote its opinion and sent down its mandate, it lost all jurisdiction of the case and any orders it made thereafter were null and void. To cite its own statement in 101 Fed. 309:

> "The District Court, having no jurisdiction, could not have possibly rendered any binding judgment."

But the Circuit Court overlooked the fact that it had already found it had jurisdiction and ordered the lower court to enter judgment. So the petitioner can assume the same rule applies and the Circuit Court could not reverse its own judgment at a later term so those orders were void.

Justice Frankfurter's concurring opinion in *Graves* v. *N. Y.*, Volume 83, Number 12, Advance Sheet, page 585:

> "A reversal of a long current of decisions can be justified only if rooted in the Constitution itself."

Here we have an unbroken line of decisions from the earliest cases to the present day that hold the method herein adopted is not allowed. To justify this reversal, the C. C. A. cited *Utah-Nevada Co.* v. *DeLamar,* 113 Fed. 113, which in no way even approaches this question.

In that connection this Court recently granted certiorari in *Chicot County* v. *Baxter,* Volume 85, Number 5, page 277, Advance Sheets. The trouble there was that a judgment had been rendered and never reversed. Certain bondholders who were bound by that judgment initiated a suit on their bonds. The former judgment was pleaded as *res judicata.* The plaintiff's contention was that the law under which the judgment was entered was declared unconstitutional. This Court held that as the plaintiffs had not raised the question of the invalidity of the statute in the suit wherein the judgment was obtained they were bound. In sustaining this the Court cited *McCormick* v. *Sullivant,* 10 Wheat. 192, wherein it was contended that the decree of the federal district court did not *show that the parties to the suit were citizens of different states* and hence the suit was *coram non judice* and the decree void but this Court said,

> "But this reason proceeds upon the *incorrect view* of the character and jurisdiction of inferior courts of the United States. They are all of limited jurisdiction, but they are not on that account inferior courts in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous and may upon appeal be reversed for that cause. But they are not absolute nullities."

This Court cited among other cases, *Skillern* v. *May,* 6 Cranch 267. In that case, after the mandate came down, the lower court attempted to point out to the appellate court the fact that the suit was between parties of the same state, but the court ordered its mandate obeyed.

In addition to the cases cited to support this rule, the petitioner cites: *Washington Bridge* v. *Stewart,* 3 How. 413; *Gaines* v. *Caldwell,* 148 U. S. 228; *Aspen* v. *Billings,* 150 U. S. 34; where facts are identical; *Hartog* v. *Memory,* 116 U. S. 558; *Deputoon* v. *Young,* 134 U. S. 241; *Greeley* v. *Lowe,* 155 U. S. 58; *Pittsburg* v. *Ramsey,* 22 Wall. 322; *Sanford* v. *Fork,* 160 U. S. 247; *Chaffin* v. *Taylor,* 116 U. S. 567; *Pacific R. R.* v. *Ketchum,* 101 U. S. 289; A. L. R. 730; *Richardson* v. *Pinsa,* 218 U. S. 289.

There is an unbroken line of decisions from the earliest day down to the present time with this one exception, that an attack of this nature cannot be maintained, and is so recognized by the text books.

3 Am. Juris., Secs. 994, 995, 998:

> "The decision on prior appeal is conclusive that *both the trial and appellate courts had* jurisdiction of the subject matter and the parties and the questions that might have been raised and were not, were set at rest even *though the objection not raised was the jurisdiction of the court.*" Sec. 1, A. L. R. 730.

That is the exact situation here. The record shows the Circuit Court had jurisdiction and found it had and this is supported by the record, on page 45 of the record, Case No. 7695, where the plaintiff testified he only took the notes on the City's promise to pay them and on page 90 of that record, the testimony was that in consideration for the City's promise, he released Osceola Golf Club of a debt it owed him. This had all the essential requirements of a novation set out in *Case* v. *Pulaski County,* 210 Fed. 366, and cited in Dobie on Federal Procedure, page 238.

It must therefore appear under the rule in *Bank of U. S.* v. *Moss,* 6 How. 47, and an unbroken line of decisions, *U. S.* v. *Moyer,* 235 U. S. 129—*National Park Bank,* 256 U. S. 131:

> "We have repeatedly held as to judgments of this Court, they cannot be changed at a subsequent term in matters of law whether attempted on motion or a *new appeal* on the mandate to the court below."

In this case, the judgment was questioned on appeal on the mandate and yet, the mandate still lay and is still in the Lower Court. But the rule is that not only cannot the judgment be reversed at another term, but in order to reverse it, the Court must recall the mandate before the term expires.

Snow v. *U. S.*, 118 U. S. 348:

> "As the case was decided at the present term and want of jurisdiction is clear, *we will recall the mandate* and vacate our judgment."

These decisions all lead to the situation in which the petitioner now finds himself. He cannot prosecute his suit to final judgment and obtain a mandate ordering its entry and then abandon that suit and sue in the State Court because he will be confronted with same situation as was Baxter State Bank in *Chicot County case, supra.* The defendant would plead *res judicata* by former recovery and the former judgment unreversed, with mandate in the lower court.

The plaintiff might attempt by replication to set up the later void judgments of the C. C. A. reversing its former final judgment at a later term.

The defendant would then rebut and cite the unbroken line of authority to show these later judgments were rendered by a court that had no jurisdiction and were void and the State Court would sustain this plea and as a result, the petitioner would be denied recovery in any court regardless of the fact the defendant owes the money, had the obligation validated by the State Legislature, page 35 of record in Case No. 7695; Chapter 14407, Special Acts, 1929, Florida Legislature, and through no fault of his own.

The trial Court inquired into its jurisdiction and found it had it, but entered a directed verdict for the defendant. The plaintiff appealed. The defendant filed no cross assignment of error raising the jurisdictional question because the record showed there was a diversity of citizenship.

Morton v. *Larney,* 266 U. S. 511:

> "If the allegations of jurisdiction are insufficiently stated, but the record shows facts to sustain it, the appellate court will consider the bill as amended and sustain the jurisdiction of the trial court."

Windholtz v. *Everett,* 74 F. 2d 834:

> "In every federal court action the question of jurisdiction is present whether raised or not and any ruling on the merits carries with it by implication a ruling on the jurisdiction."

After the Circuit Court found it had jurisdiction, passed on all the questions involved and sent down its mandate, the only relief the defendant could have lawfully obtained was to petition this court for certiorari. It did not do so, the term passed and when the plaintiff made his motion for entry of judgment on the mandate, then, for the first time the defendant raised the question of jurisdiction (page 32, record in Case No. 8437), and regardless of the rule in *Slocum* v. *N. Y. Life,* 228 U. S. 381.

Pacific v. *Faish,* 213 Fed. 448:

> "By making motion for directed verdict, the party waives his right to jury trial, and impliedly consents to the entry of a judgment against him, if the motion is granted and judgment reversed."

And as there were no issues left to try, the motion for final judgment (Page 28 of record in Case No. 8437) should have been allowed and no new trial granted. The lower Court held (Page 359 of record in 8437), the remaining issues were whether the notes were under seal and what a reasonable attorney's fee was for their collec-

tion, regardless of the fact their being under seal was not denied and they were under seal and in evidence (Page 47 of record in Case 7695) and testimony as to what a reasonable attorney's fee was in evidence and had not been questioned (Page 62 of record in Case 7695).

It was improper to review such questions again, but as long as the judgment entered (Page 41 of record in Case 8437) was in substantial compliance with the mandate, it was felt that upon entry of this judgment the case was at an end and the jurisdiction of the Federal Court ceased.

What the petitioner seeks to show is that the proceedings from that point on were novel and for which no allowance is made by either court rule or statute, but, on the contrary, all the law and decisions prevent.

The result that such method produces is to reserve a possible defense until such time as the plaintiff cannot be heard, the trial Court cannot reverse its superior Court for finding it has jurisdiction, the appellate Court loses jurisdiction after it sends down its mandate and the term closes. It cannot again review this question in that case because if it does and finds otherwise, it reverses its own decision at another term and the result of such procedure is to deny the plaintiff a recovery in any court regardless of the fact the unreversed judgment of the Circuit Court of Appeals is that the plaintiff is entitled to recover.

Re Parker, 120 U. S. 739, 7 S. Ct. 767:

> "The Writ of Mandamus properly lies in cases where the court refuses to take jurisdiction when by law it ought to do so."

This Court can appreciate the situation of the trial judge and the plaintiff. When the mandate came down on first final decree, that mandate ordered the court to enter judgment for the plaintiff. Upon entry of that judgment, the Federal Courts lost jurisdiction of the case as judgment had been entered in compliance with that mandate.

Upon the second appeal, the Circuit Court reversed the trial Court for doing what it had ordered, regardless of the fact it had not withdrawn its mandate and the term in which it rendered the judgment had long passed.

As the plaintiff saw the situation, the Circuit Court had no such right and its later judgments of reversal were *coram non judice,* so the plaintiff asked the trial Court to disregard such proceedings and enter judgment on the unrecalled mandate.

The District Court refused to do so on the ground the plaintiff could sue at law in the State Court, not that the mandate was not still in his Court and had not been recalled and reversed.

Petitioner appreciates the fact the novel construction of the Circuit Court as to its continuation of jurisdiction, placed the Trial Court in an uncomfortable position. It had obeyed its mandate and entered judgment and then was reversed for so doing. Now if it took the position the reversal was without authority, it might be held in error; if it did not enter judgment, it might be held in error. On the horns of this dilemma, it found the plaintiff could still sue in the State Court.

If the plaintiff had a right to sue in the Federal Court and the record shows it had that right, he had that election and made it and had a mandate that only required the entry of final judgment thereon. Could the plaintiff prosecute a suit to such a conclusion and then abandon its case and start a new action in the State Court?

15 R. C. L. 569, Sec. (2):

> "A judgment is the law's last word in a judicial controversy."

15 R. C. L. 581, Sec. 16:

> "As soon as a judgment is rendered, the rights of the parties are established and between them it is not necessary it should be entered of record."

If Title 28, Section 347, made the judgment of the C. C. A. in 81 F. 2d 968 final from which no appeal lay, either from the mandate or otherwise, *U. S.* v. *Mayer,* 235 U. S. 129, and under the law the only possible way this could be reversed was by this Court by certiorari and such method had never been pursued, then how could the plaintiff possibly prevail in the State Court over the objections of the defendant on a plea of former recovery, and was the unrecalled mandate not conclusive as to the right of the plaintiff to have judgment entered thereon?

The vistas that such method of procedure opens to conjecture are so vast as to undermine any value Courts may have and are so far reaching as to put in jeopardy any decision of the Federal Court entitled a final judgment. Collateral attacks on judgments are forbidden because, if successful, bring the Courts into disrepute and wrest vested rights from parties.

The law permitted the defendant to petition this Court for certiorari to review that first judgment if the defendant was not satisfied. It waived its right because no error appeared, but even had error appeared and it did not seek to have it corrected, it was bound.

This case sets a precedent to open the door to a method of defeating suitors in the Federal Court and make it impossible to recover in any court their obligations owed them and it is for this reason the petitioner feels certiorari should be granted, because unless reversed, any defendant in such a suit in the Federal Court can reserve such a possible defense, regardless of the record showing diversity of citizenship, and then present it at a time when the lower Court cannot entertain it and because it does not, the case is appealed and the appellate Court, being without jurisdiction, having already passed on the question, knocks the plaintiff out of court on a question on which he is not permitted to be heard and with its unrecalled mandate in the lower Court denies the plaintiff a recovery in any court.

Such proceeding is not due process of law and, if there be any statute to sustain it, such statute would be one of pains and penalties.

Petitioner shows that he prayed for alternative writ of mandamus under the rule in *In re Grossmayer*, 177 U. S. 665, and under the belief the new rules of Federal procedure only apply to actions of which the District Courts have original jurisdiction, but the pleading, if wrongfully entitled, could be considered as a petition for the rule.

Wherefore, the petitioner contends that after the Trial Court entered judgment in compliance with the mandate of the Circuit Court, the jurisdiction of the Federal Court ceased and he was entitled to have his judgment entered and undisturbed, the later rulings of both the Federal Courts were *coram non judice* and without force and effect and void and the appellate Court should have granted the rule against the District Judge.

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